INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute, administrative regulation and Federal Rules of Civil Procedure involved	2
Statement	5
A. The substantive charge	5
B. The discovery proceedings in the trial court	8
Specification of errors to be urged	15
Summary of argument	16
Argument:	
I. Irrespective of the question of privilege, the district court's order for the production of documents is erroneous both because the moving party did not show "good cause" for their production and because the production required exceeds the limits of permissible discovery under the Federal Rules of Civil Procedure	20
A. The moving party failed to show "good cause" for the production which the district court ordered	20
B. The production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34	25
II. The correspondence of the Department of Justice and reports of agents of the Federal Bureau of Investigation which the district court ordered produced were privileged, and thus not subject to discovery	29
Introduction	29
A. Revised Statutes, Section 161, and valid regulations thereunder, vest in the Attorney General the power and duty to determine the privileged character of the documents which the district court ordered to be produced	31
B. R. S. 161 reflects the constitutional independence of the executive	35
C. The right to keep confidential documents of the kind here involved gives effect to sound considerations of public policy	50
D. The executive privilege is not abandoned when the Government brings suit	57
E. The district court improperly refused to honor the executive privilege under the circumstances of this case	63
Conclusion	64

CITATIONS

Cases: Page

Admiralty Commissioners v. *Aberdeen Steam Trawling & Fishing Co.* (1909) Sess. Cas. 335 47

Alltmont v. *United States*, 177 F. 2d 971 ..... 22–23, 27–28, 59

Anglo-Saxon Petroleum Co. v. *United States*, 78 F. Supp. 62 .. 59

Arnstein v. *United States*, 296 Fed. 946, certiorari denied, 264 U. S. 595 54

Bank Line Limited v. *United States*, 68 F. Supp. 587, 163 F. 2d 133, 76 F. Supp. 801 ..... 58, 59

Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U. S. 800, rehearing denied, 315 U. S. 828 63

Boske v. *Comingore*, 177 U. S. 459 ... 18, 19, 32–34, 39, 49, 58, 59

Brent v. *Hagner*, Fed. Cas. No. 1839 35

Chicago & Southern Air Lines v. *Waterman S. S. Corp.*, 333 U. S. 103 47

Cooper v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643, rehearing denied, 305 U. S. 673, 307 U. S. 651 .. 26

Duncan v. *Cammell, Laird & Co.* (1942) A. C. 624 ..... 19, 44–49, 51, 56, 59, 60

Dwelly v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 43

Elrod v. *Moss*, 278 Fed. 123 54

Federal Life Ins. Co. v. *Holod*, 30 F. Supp. 713 35

Firth Sterling Steel Co. v. *Bethlehem Steel Co.*, 199 Fed. 353 .. 50

Fleming v. *Superior Court*, 196 Cal. 344, 238 Pac. 88 43

French, In re, 315 Mo. 75, 285 S. W. 513 43

Gardner v. *Anderson*, Fed. Cas. No. 5220 50

Gray v. *Pentland*, 2 Serg. & Rawles 23 (Pa., 1815) 50

Grove, In re, 180 Fed. 62 50

Hartranft, Appeal of, 85 Pa. 433 (1877) 57

Harwood v. *McMurtry*, 22 F. Supp. 572 50

Herrnstein, In re, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941) 43

Hickman v. *Taylor*, 329 U. S. 495 ..... 16, 17 21, 23–30

Hickok v. *Margolis*, 221 Minn. 480, 22 N. W. 2d 850 43

Huttman, In re, 70 Fed. 699 35

Lamberton, In re, 124 Fed. 446 35

Leave v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N. E. 2d 483 .. 43

Maine v. *Fortin*, 106 Me. 382, 76 A. 896 54

Manufacturers Trust Co., Appl. of, 269 App. Div. 108, 53 N. Y. S. 2d 923 43

Marbury v. *Madison*, 1 Cranch 137 39–40

Martin v. *Capital Transit Co.*, 170 F. 2d 811 23

Maryland Casualty Co. v. *Clintwood Bank*, 155 Va. 181, 154 S. E. 492 43

Meyer v. *Home Insurance Co.*, 127 Wis. 293 35

Mooney v. *Holohan*, 294 U. S. 103 61

Oklahoma Tax Comm. v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143 43

Pacific-Atlantic S. S. Co. v. *United States*, 175 F. 2d 632, certiorari denied, 338 U. S. 868 59

POOR COPY

BLEED THROUGH

Cases—Continued

	Page
Peden v. *Peden's Adm'r*, 121 Va. 147, 92 S. E. 984 (1917)	43
People v. *Davis*, 52 Mich. 569, 18 N. W. 362 (1884)	62
People v. *Laird*, 102 Mich. 135, 60 N. W. 457	54
Pollen v. *Ford Instrument Co.*, 26 F. Supp. 583	50
Quarles and Butler, In re, 158 U. S. 532	54
Rex v. *Davies* (1945) 1 K. B. 435	47
Robinson v. *State of South Australia* (1931) A. C. 704	44
Sackett, Ex Parte 74 F 2d 922	34, 60
Safeway Stores v. *Reynolds*, 176 F. 2d 476	22
Samish v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305	43
Scher v. *United States*, 305 U. S. 251	54
Segurola v. *United States*, 16 F. 2d 563, affirmed, 275 U. S. 106	54
Simonsen v. *Barth*, 64 Mont. 95, 208 P. 938	43
State v. *Soper*, 16 Me. 293	54
State of Maryland to use of Daisy Kent v. *United States*, 1947 A. M. C. 1336 (D. Md., 1947)	59
Stegall v. *Thurman*, 175 Fed. 813	35
Thaden v. *Bagan*, 139 Minn. 46, 165 N. W. 864 (1917)	43
Thompson v. *German Valley Railroad Co.*, 22 N. J. Eq. 111 (1871)	50
Totten v. *United States*, 92 U. S. 105	50, 58
Trial of Thomas Hardy, 25 State Trials (1794) 199	61
United States v. *Andolschek*, 142 F. 2d 503	61
United States v. *Beekman*, 155 F. 2d 580	61
United States v. *Cohen*, 145 F. 2d 82, certiorari denied, 323 U. S. 799	63
United States v. *Coplon*, Criminal No. 381–49, D. C. (1949)	61
United States v. *Deere & Co.* (D. Minn. 1949), C. C. H. Trade Reg. Reporter, par. 62,572	59
United States v. *De Normand*, 149 F. 2d 622, certiorari denied, 326 U. S. 756, rehearing denied, 326 U. S. 808, 811, 327 U. S. 816	63
United States v. *Ebeling*, 146 F. 2d 254	63
United States v. *Grayson*, 166 F. 2d 863	60, 61
United States v. *Haugen*, 58 F. Supp. 436, affirmed, 153 F. 2d 850	51
United States v. *Kohler Co.*, 13 Fed. Rules Serv. 33.333 (E. D. Pa.)	59
United States v. *M. Kraus & Bros.*, 149 F. 2d 773, reversed 327 U. S. 614	63
United States v. *Krulewitch*, 145 F. 2d 76, on retrial, 167 F. 2d 943, reversed, 336 U. S. 440	61
United States v. *Li Fat Tong*, 152 F. 2d 650	54
United States v. *The Lorain Journal Co., et al.* (N. D. Ohio, E. D.), decided Feb. 15, 1950	59
United States v. *Moses*, Fed. Cas. No. 15825	54

Cases—Continued	Page
United States v. *Schine Chain Theaters, Inc.*, 4 F. R. D. 108 (W. D. N. Y.)	59
United States v. *Simonds*, 148 F. 2d 177	63
United States ex rel. Touhey v. *Ragen and McSwain* (C. A. 7), decided Feb. 24, 1950	35
Vogel v. *Gruaz*, 110 U. S. 311	54
Walling v. *Comet Carriers*, 3 F. R. D. 442	35, 59
Walling v. *Richmond Screw Anchor Co.*, 4 F. R. D. 265 (E. D. N. Y.)	59
Weeks, In re, 82 Fed. 729	35
Weinberg v. *United States*, 126 F. 2d 1004	26
Worthington v. *Scribner*, 109 Mass. 487	54
Wright-Papoose, The, 2 F. Supp. 43	59
Statutes, Rules of Procedure, and Regulations:	
1 Stat. 28, 49, 65, 68, 553	35
Revised Statutes, Section 161, 5 U. S. C. 22	2, 18, 31, 35, 50, 60
Sherman Act, 26 Stat. 209, 15 U. S. C. 1	5, 6
Federal Rules of Civil Procedure:	
Rule 26	4, 20, 30
Rule 34	4, 8, 16, 17, 20, 21, 29–30
Rule 37	15
Federal Rules of Criminal Procedure, Rule 16	62
Department of Justice Order No. 3229, 11 F. R. 4920	3, 32, 33
5 U. S. C. 299, 300	26
5 U. S. C. 310	26
5 U. S. C. 311	26
State and British Statutes:	
Calif. Code Civ. Prod. Ann. § 1881 (5) (1941)	42
Colo. Stat. Ann. Ch. 177 § 9 (1949)	42
Ga. Code Ann. § 38–1102 (1937)	42
Idaho Code Ann. § 9–203 (1948)	42
Code of Iowa § 622.11 (1946)	42
Minn. Stat. Ann. § 595.02 (5) (West 1947)	42
Mont. Rev. Code Ann. § 10536 (5) (1935)	42
N. D. Rev. Code § 31–0106 (1943)	42
Neb. Rev. Stat. § 25–1208 (1948)	42
Nev. Comp. Laws Ann. § 8975 (1929)	42
Oreg. Comp. Laws Ann. § 3–104 (5) (1940)	42
S. D. Code § 36.0101 (5) (1939)	42
Utah Code § 104–49–3 (1943)	42
Wash. Rev. Stat. Ann. § 1214 (5) (1932)	42
The Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, § 28	49
Miscellaneous:	
American Law Institute, *Model Code of Evidence* (1942), Rule 228	42
Annual Report of the Attorney General, 1946, p. 354	27

POOR COPY

Miscellaneous—Continued

	Page
20 Canadian Bar Review 805	49
21 Canadian Bar Review 51	49
17 Congressional Record 2211–2814, 4095	38, 39
96 Congressional Record 589–590 (H. Res. 427, 81st Cong., 2d Sess.)	37
96 Congressional Record (daily ed.) 1428, 1429	38
96 Congressional Record (daily ed.) 1727 (H. Res. 465)	36
96 Congressional Record (daily ed.) 1803, 1804 (H. Res. 469)	38
Dillon, *Marshall: Life, Character, Judicial Services*, (1903), Vol. I, pp. XLVI–XLIX	40
Directive of President Truman, March 13, 1948, 13 F. R. 1359	50
Federalist, The, Nos. XLVII, XLVIII	36
Ford, *Writings of Thomas Jefferson* (1898), Vol. 9, pp. 55–57, (62)	40
Greenleaf, *Evidence* (1899 Ed.), Vol. I, Sec. 251	42
Jones, *Evidence* (4th Ed., 1938), Vol. 3, Sec. 762	42
Journals of the Continental Congress, Vol. XXII (1782), pp 87–92	36
H. Rep. No. 141, 45th Cong., 3d Sess	37–38
58 Law Quarterly Review 31, 436	44, 49
59 Law Quarterly Review 102	49
Note, 165 A. L. R. 1302	43
11 Opinions of the Attorney General 137	41
15 Opinions of the Attorney General 378	41
16 Opinions of the Attorney General 24	41
25 Opinions of the Attorney General 326	41
40 Opinions of the Attorney General 45	41
Production of Documents: The State and the Individual (1942) 193 Law Times 224	49
Richardson, *Messages and Papers of the Presidents:*	
Vol. I, p. 219	56
Vol. VIII, pp. 375–383	38
Robertson, *Burr's Trials* (1808):	
Vol. 1, pp. 177, 180, 186–188	40
Vol. 2, pp. 535–536	31, 40–41
Sanford: *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949)	43
Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235–243	38
Wigmore, *Evidence* (1905), Sec. 2375	42
Wigmore, *Evidence* (1940), Sec. 2378a	42
Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar. J. 103–150, 223–259, 319–350	36, 37

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 490

UNITED STATES OF AMERICA, APPELLANT

v.

COTTON VALLEY OPERATORS COMMITTEE ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court did not file an opinion in support of its judgment dismissing the complaint but set forth the reasons therefor in a prior oral ruling (R. 217–218) and in its judgment and order of dismissal (R. 218–220). Opinions filed by the district court on certain preliminary motions and on a motion to dismiss the complaint for failing to state a cause of action (R. 45–54, 55, 56–62) are not yet reported.

JURISDICTION

The judgment of the district court was entered on September 20, 1949 (R. 218). The petition for

appeal was filed and allowed on November 16, 1949 (R. 220, 221). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. Probable jurisdiction was noted on January 9, 1950 (R. 267).

QUESTIONS PRESENTED

1. Whether there was a "showing of good cause" sufficient under Rule 34 of the Federal Rules of Civil Procedure to justify the order to produce entered by the district court.

2. Whether the district court's order required production of the work product of the lawyer and invaded the privacy essential to proper performance of his professional duties, and thus went beyond the discovery permissible under the Federal Rules of Civil Procedure.

3. Whether the documents which the district court ordered to be produced are "privileged" and, in the circumstances of this case, free from discovery.

STATUTE, ADMINISTRATIVE REGULATION, AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Section 161 of the Revised Statutes, 5 U. S. C. 22, provides:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers

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and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Department of Justice Order No. 3229, 11 F. R. 4920, provides:

> Pursuant to authority vested in me by R. S. 161 (U. S. Code, Title 5, section 22), *It is hereby ordered:*
>
> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a subpoena *duces tecum* is served to produce any of such files, documents, records or information, the officer or employee on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein, on the ground that the disclosure

878668—50——2

of such records is prohibited by this regulation.

FRANK MURPHY,
The Attorney General.

Rule 34 of the Federal Rules of Civil Procedure, as amended, provides so far as pertinent:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control * * *.

Rule 26 (b) of the Federal Rules of Civil Procedure, as amended, provides:

> Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the

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identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT

A. *The substantive charge.*—This is a civil proceeding brought by the United States in June 1947 against the Cotton Valley Operators Committee, an unincorporated association of owners of rights to produce oil and gas within the Cotton Valley Oil Field, Webster Parish, Louisiana, and various corporations and individuals, all owners of such rights and members of said Committee. The complaint charged that the defendants, appellees here, had conspired to restrain and monopolize interstate commerce in hydrocarbons taken from the Cotton Valley Field and in products made from such hydrocarbons, in violation of Sections 1 and 2 of the Sherman Act.

The allegations of the complaint (R. 1–9), as supplemented by "more definite statements" thereof filed by the plaintiff (R. 42–44, 64–71), may be summarized as follows:

The Cotton Valley Oil Field, which will be referred to as the Field, contains hydrocarbons in both liquid and gaseous forms. They lie at great depths under high pressure within the reservoirs, and this pressure is used to bring the liquid and gaseous hydrocarbons to the surface. This

pressure-induced flow to the surface is sometimes referred to as the natural flow from the Field. There would be a rapid reduction in the underground gas pressure necessary to ultimate recovery of the hydrocarbons in the Field without reinjecting a part thereof into the underground reservoirs. Such reinjection is not economically practicable for individual owners of producing rights in the Field, of whom there were more than 30 (R. 4).

In an effort to solve this problem, producers representing more than 50% of the Field's production entered into an agreement in June 1940 providing for the construction and operation of a recycling plant by a joint agency known as the Operators Committee. The agreement provided for separating and reinjecting into the underground reservoirs a part of the hydrocarbons obtained from the natural flow and for apportioning among the parties the balance of the hydrocarbons so obtained. This agreement and operations thereunder were approved by the Commissioner of Conservation of the State of Louisiana pursuant to statute.[1] They are not a part of the violation of the Sherman Act charged in the complaint (R. 4–5, 64–65).

[1] 1936 Acts of Louisiana, No. 225; 1940 Acts of Louisiana, No. 157. Orders of the Commissioner of Conservation No. 10–b, July 1, 1940, and No. 10–c, January 28, 1941.

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At or shortly after the recycling plant began operations in May 1941, the defendants agreed that they would jointly extract, process and refine various separate hydrocarbons and hydrocarbon products from that portion of the natural flow not reinjected into the Field.[2] They also agreed that they would jointly sell what they had jointly produced, at fixed and uniform prices and through jointly selected channels of distribution. Such joint activity is not authorized by the conservation laws of Louisiana or by the orders of its Conservation Commissioner, does not prevent waste of the oil and gas resources of the Field, and does not contribute to separating and reinjecting into the Field part of the hydrocarbons taken from it (R. 1–8, 65–67).

At all times during the period covered by the complaint, there were adequate facilities, other than those jointly operated by the defendants, for extracting, processing and refining separate hydrocarbons and hydrocarbon products obtained from that portion of the natural flow not reinjected into the Field. There were also pipeline connections available for transporting said portion of the flow to such facilities. By their combination, appellees have excluded others from

[2] They thus jointly processed and refined, among other things, normal-butane, iso-butane, propane, propane-butane mixture, toluene concentrate, gasoline, kerosene, fuel oil, residue, and kerosene-residue mixture (R. 65–66).

refining, selling and transporting hydrocarbons produced from the Field (R. 8–9, 67–71).

B. *The discovery proceedings in the trial court.*—In response to a motion under Rule 34 of the Federal Rules of Civil Procedure (*supra*, p. 4), filed by appellee Magnolia Petroleum Company,[3] the United States furnished 89 documents, a summary description of which covers seven pages of the printed record (R. 83–90). Pursuant to the district court's ruling on written interrogatories propounded by Magnolia under Rule 33, the United States classified and supplied the documentary evidence upon which it relied to establish the conspiracy charged in the complaint.[4] And in response to the Court's ruling on the same interrogatory, the United States furnished the names and addresses of all of its prospective witnesses (R. 168–169) and the oral statements made to it by the persons whom the United States expected to use as witnesses (R. 169–186).[5]

[3] The motion requested production of all "letters, copies, photostats, lists, abstracts, telegrams, memoranda or other writings taken from the files of CVOC or Woodley Petroleum Corporation, sent or received by any defendant, for the period January 1, 1938, to June 16, 1947," relative to nine specified issues (R. 78–79). Paragraph III of the motion also includes "tender tickets" and monthly reports" and paragraph IV "proposed and/or executed contracts" (R. 79).

[4] See Interrogatories Nos. 1 through 7–B and 13 through 15–A (R. 91–94) and the answers thereto (R. 165–167, 186–187, 192–193).

[5] No written statements had been obtained from the expected witnesses (R. 169).

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In addition, the Magnolia Petroleum Company, one of the defendants, served subpoenas *duces tecum* on the Attorney General and on the United States Attorney for the Western District of Louisiana, together with notice of Magnolia's intention to take their oral depositions (R. 15–17). After the government had filed a motion to strike or to limit the notice of intention to take depositions (R. 13–15),[6] the district court quashed the subpoenas (R. 54). In an opinion rendered on January 21, 1948, it held that the reasons asserted for taking the depositions and issuing the subpoenas—that the suit was induced by political considerations and was not brought in good faith—were irrelevant to the question of appellees' violation of the antitrust laws and therefore did not provide basis for the subpoenas or the proposed depositions (R. 45, 52–54).

A motion for production of documents was thereafter filed by the Ohio Oil Company under Rule 34 (R. 33, 77). It called for the production of the same documents as those demanded

[6] In support of its motion, the Government filed an affidavit of the Attorney General which stated in part (R. 25):

"That he has examined the subpoena *duces tecum* addressed to him in connection with the above entitled case, and that, in his opinion, the production of the records and documents requested therein would impede the Department of Justice in its enforcement of the law and would not be in the public interest."

in Magnolia's subpoenas *duces tecum*.[7] An order was sought requiring the United States to produce the following insofar as they relate to activities of the defendants in, or in connection with, the production, processing, and marketing of hydrocarbons produced from the Cotton Valley Field (R. 33):[8]

> 1. All reports (with exhibits attached thereto or filed therewith) made by agents or employees (or any agent or employee) of the Federal Bureau of Investigation to the Attorney General or to the Department of Justice of the United States during the period extending from February 1, 1946, to the date of institution of this action * * *.
>
> 2. All letters, telegrams, and other communications of every kind or copies thereof (together with copies of replies thereto) received by the Department of Justice of the United States (during the period extending from August 1, 1945, to the date of institution of this action) from private individuals, corporations or associations (including parties to this action) * * *.

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[7] Compare paragraphs (1) and (2) of the subpoenas (R. 19–20, 22) with paragraphs (1) and (2) of the Ohio Oil Company's motion (R. 33).

[8] The Ohio Oil Company's motion was adopted by various other appellees—Magnolia Petroleum Company (R. 210), Cotton Valley Operators Committee (R. 211), Stanolind Oil and Gas Company (R. 257), and Texas Gulf Producing Company (R. 262).

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The motion was supported by an affidavit by the Secretary of appellee Cotton Valley Operators Committee. The affidavit recites that agents of the Federal Bureau of Investigation had been given permission to examine the books and records of the Committee for the purposes of enabling them to make a report on the application of the federal antitrust laws to activities of the Committee; that such examination was made during the period February–June 1946; that the agents withdrew or made copies of various documents in the possession of the Committee or made available through it; that they had made a complete report of their investigation to the Attorney General; that the extent to which records, documents, etc., were obtained from the Committee or from other sources and the "nature of the evidence included in the reports made to the Attorney General" are unknown to persons outside the Department of Justice (R. 34–35). The affidavit then avers (R. 36):

> That to permit the government to refuse to disclose the information obtained through the investigation mentioned will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross examination of witnesses and for a proper preparation for trial and will unfairly operate to their prejudice.

878668—50——3

The affidavit bears upon paragraph 2 of the motion to produce only to the extent that it avers that "affiant was informed by one of the agents referred to that the investigation being conducted was brought about as the result of requests made by individuals (or a private corporation or corporations for whom they acted), whose names, however, were not specified" (R. 35).

In an opinion filed on April 22, 1948, the district court held that the Ohio Oil Company's motion to produce presented the same issues as those on which it had ruled when it quashed the subpoenas issued on the request of the Magnolia Petroleum Company, and that the motion to produce should be denied for the reasons stated in the opinion quashing these subpoenas (R. 56, 61). After entry of a formal order denying the motion to produce (R. 63) and a motion to set aside this order (R. 77), the district court, at a hearing on March 11, 1949, orally reversed its denial of the motion to produce, but stated that it would determine the question of privilege as to all documents which the United States claimed to be privileged (R. 105, 159–160).

The United States filed a motion to vacate the order of March 11, 1949, and attached to its motion an affidavit by the Attorney General (R. 161, 162). The affidavit states in part (R. 163–164):

> That the efficient administration of the laws entrusted to his enforcement, as well

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> as the public interest require that the Attorney General keep as confidential investigatory reports made to him by agents of the Federal Bureau of Investigation relating to violations of Federal statutes;

The affidavit further states that the Attorney General "has determined and hereby asserts" that the reports of F. B. I. agents which the court had ordered produced "are privileged," but that he was willing that "all of the factual information contained in the reports may be extracted from the reports and presented to the Court for its determination as to whether or not such information is properly producible to the defendant for inspection and copying" (R. 164).

At a further hearing on June 16, 1949 (R. 196), counsel for the United States advised the court that he had personally gone through each report by an F. B. I. agent covered by the motion to produce and had "copied verbatim" the agent's statement of every interview he had had, whether favorable to the government or not, and his references to any documents which he had examined; that the portions of the reports thus copied ran to 175 pages of legal size; that the Attorney General waived his privilege as to such extracts but would like instructions within the Department of Justice to be kept confidential; and that the only things in the reports not included in the extracts submitted to the court were (1) "technical procedural matters" such as analysis of a

memorandum from an attorney in the case outlining information to be sought, (2) referrals of "leads" to agents in other parts of the country, and (3) at least two instances in which an agent, who was an accountant and had seen only part of the material obtained, had volunteered an opinion on the merits of the case (R. 197–198). Counsel further stated (R. 198):

> I am willing to permit the court to compare this with the original reports which I have with me to determine whether or not I have made a correct extraction, but the Attorney General has requested that offer be made on the condition that they not be turned over to the defendants.[9]

The court ruled that it would insist upon full production, but allowed counsel for the United States to consult with the Attorney General (R. 205, 208–209). After counsel had advised the court at a hearing on July 13, 1949, that the Attorney General adhered to the position taken at the preceding hearing, the court ruled that the documents covered by the motion of the Ohio Oil Company should be produced and that the court would then determine the question of privilege as to any document or part thereof claimed to be privileged (R. 213–218).

Judgment dismissing the complaint for failure to comply with the order to produce was entered

[9] For a repetition of this statement, see R. 204.

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on September 19, 1949 (R. 220),[10] and the United States has appealed from this judgment of dismissal.

SPECIFICATION OF ERRORS TO BE URGED

The district court erred—

1. In dismissing the complaint for failure of the plaintiff to produce reports of the Federal Bureau of Investigation during the period from February 1, 1946, to June 17, 1947, and correspondence of the Department of Justice during the period from August 1, 1945, to June 17, 1947, relating to the subject matter of the present action.

2. In granting the motion for production of the foregoing documents, as more particularly described in the motion, notwithstanding the affidavits of the Attorney General that in the public interest said documents are privileged and confidential.

3. In granting the motion for production of said documents, as more particularly described in the motion, in that the required production encroached upon the executive's authority under the Constitution and violated Section 161 of the Revised Statutes as implemented by the order made pursuant thereto by the Attorney General on May 2, 1939.

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[10] Rule 37 (b) (2) (iii) provides that if a party refuses to obey an order made under Rule 34 the court may enter an order dismissing the action.

4. In granting the motion for the production of said documents in that good cause for their production was not shown, as required by Rule 34 of the Federal Rules of Civil Procedure, and in that the documents were not within the scope of the discovery provisions of Rule 34.

SUMMARY OF ARGUMENT

I

A. Appellees have failed to show the good cause required by Rule 34 as a condition to obtaining a court order directing another party to produce documents. Appellees' motion which the district court granted called for (1) reports made to the Attorney General by F. B. I. agents and (2) correspondence between the Department of Justice and private persons. Their supporting affidavit merely avers that nondisclosure of the information sought will prejudice the appellees in preparing for trial. Such general, stereotyped allegation could be made in any law suit, and does not constitute the precise and particular showing required by the Rule. Further, *Hickman* v. *Taylor,* 329 U. S. 495, 508, indicates that what constitutes a showing of "good cause" is to be judged in the light of information already supplied. Here the United States has already furnished all documents specifically requested, the names and statements of all prospective witnesses, and has offered verbatim copies of F. B. I. agents' reports of interviews, and all documents referred to

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in the F. B. I. reports. If a litigant requires discovery beyond this, a particularization of his need is essential to a showing of good cause.

B. The production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34. In *Hickman* v. *Taylor* this Court held that pretrial discovery did not encompass the production of the "work product" of a lawyer necessary to the privacy of preparation for litigation. There could hardly be a clearer invasion of that privacy than to require a lawyer to produce his correspondence relating to a case in litigation. The reports made by the agents of the Federal Bureau of Investigation are likewise the work product of the lawyer. To the extent that the F. B. I. agents are part of the legal staff in the case, the rule of the *Hickman* case applies directly. But in any event their investigations are directed and controlled by the lawyers in charge of the litigation, and their work is of the kind protected by the professional right to privacy. Even if there might be special and unusual circumstances justifying discovery of such documents, such circumstances are clearly lacking here.

II

Rule 34 exempts from discovery documents which are privileged. We contend that the documents here sought are privileged and that that is an independent ground for reversal of the

judgment below. But that contention, though independent, is not unrelated to the argument already advanced that the appellees have not shown sufficient justification for production under the Federal Rules. For when there is a substantial question of privilege raised, as here, the very existence of such question requires a stronger showing of need than might otherwise be demanded.

A. The privilege against disclosure which the Attorney General has asserted is directly supported by R. S. 161, which authorizes the head of a department to prescribe regulations not inconsistent with law for the government of his department and the custody, use, and preservation of the records pertaining to it. Pursuant to this authority, the Attorney General promulgated an order designating all official files and documents as confidential and forbidding disclosure except in the discretion of the Attorney General. *Boske* v. *Comingore,* 177 U. S. 459, directly establishes both that R. S. 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional.

B. R. S. 161 is a reflection of the constitutional independence of the executive. The immunity from disclosure of materials deemed confidential by the executive has been consistently and successfully asserted as against congressional demands, and has been honored by the federal courts since the earliest days of the Republic. That the

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executive privilege is constitutionally supported is evidenced, too, by the recognition accorded it by state legislatures and courts, as well in the British law (see *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624).

C. The privilege thus granted to the executive reflects an established public policy based upon several elements. Among them are the efficient administration of the government free from interference, secrecy of matters of national security, protection of communications by informants, as well as the independent functions of the executive and the judiciary. Whether the public interest permits disclosure is normally for the executive to determine. For it is executive officers who are responsible for the administration of the laws and who are in a position to evaluate the importance of keeping confidential particular information sought, in relation to an entire course of government policy or action.

D. The public interest in nondisclosure is no less in cases in which the Government is the moving party than in cases, like *Boske* v. *Comingore*, in which it is not. A rule-of-thumb doctrine of waiver of the privilege when the Government brings suit would force the Government to choose between faithfully executing its duty to enforce the laws and protecting the public interest against nondisclosure of confidential information. Such a mechanical conditioning of the rights of the

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Government is not adapted to appropriate accommodation of the various competing considerations.

E. In the circumstances of this case, however, it is not necessary to decide the extremely delicate question of how far the executive privilege should give way in order to assure a fair trial. In view of the disclosures already made by the United States and in view of the fact that in this case the problem arises before trial, no substantial ground has been shown for judicial review of the executive determination that disclosure of the documents sought would not be in the public interest.

ARGUMENT

I

IRRESPECTIVE OF THE QUESTION OF PRIVILEGE, THE DISTRICT COURT'S ORDER FOR THE PRODUCTION OF DOCUMENTS IS ERRONEOUS BOTH BECAUSE THE MOVING PARTY DID NOT SHOW "GOOD CAUSE" FOR THEIR PRODUCTION AND BECAUSE THE PRODUCTION REQUIRED EXCEEDS THE LIMITS OF PERMISSIBLE DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A. *The moving party failed to show "good cause" for the production which the district court ordered.*—Rule 34 of the Federal Rules of Civil Procedure provides that upon motion of any party "showing good cause therefor" the court may order a party to produce any document in his possession, not privileged, which furnishes

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evidence relevant to the subject matter of the proceeding. (See also Rule 26 (b).) As this Court said in *Hickman* v. *Taylor,* 329 U. S. 495, 512, note 10, "Rule 34 is explicit in its requirements that a party show good cause before obtaining a court order directing another party to produce documents." The concurring opinion in that case further emphasized that the necessary foundation for an order under Rule 34 is lacking where "the demand is made on the basis of right, not on showing of cause" (329 U. S. 495, at p. 519).

In this case the appellees have made no showing of cause beyond a stereotyped allegation of advantage if production is ordered and disadvantage if it is denied. Since such allegation could be made in any case, a ruling that it is sufficient would in effect read out of Rule 34 the requirement that "good cause" be shown. The motion under Rule 34 which the district court granted called for (1) reports made to the Attorney General by F. B. I. agents and (2) letters, telegrams and other communications (together with the replies thereto) received by the Department of Justice from private individuals, corporations or associations (R. 33). The affidavit filed in support of the motion (R. 34–36) refers in some detail to an investigation made by agents of the Federal Bureau of Investigation and, with reference to defendants' need for the documents sought, merely avers that non-

disclosure of "the information *obtained through the investigation mentioned* will materially hamper and delay defendants in their preparation for trial, will deprive them of materials required for the cross examination of witnesses and for a proper preparation for trial and will unfairly operate to their prejudice" (R. 36). [Italics supplied.]

Such purely general allegations obviously find no special support in the circumstances of this case and could be made in every case in which the United States or any other party had investigated the facts in contemplation of litigation and had received written reports of the results of the investigatory reports."

The demand for the production of correspondence between the Department of Justice and others (see *supra*, p. 10) is not supported at all, unless a statement in the affidavit attached to the motion to the effect that one of the FBI agents had stated that the investigation had resulted from requests made by unnamed individuals (R. 35) is to be construed as support. In any event, there is no showing as to how or why disclosure of such communication would aid defendants in preparing for trial.

The Court of Appeals for the Third Circuit, sitting *en banc* in *Alltmont* v. *United States*, 177 F. 2d 971, has carefully considered the "good cause"

[11] More definite statements than this have been held insufficient as a showing of good cause. *Safeway Stores* v. *Reynolds*, 176 F. 2d 476, 478 (C. A. D. C.).

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requirement of Rule 34 in the light of this Court's decision in *Hickman* v. *Taylor*. Its conclusions follow (p. 978):

> In other words he must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage of his adversary's industry in seeking out and interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case.

In *Martin* v. *Capital Transit Co.*, 170 F. 2d 811 (C. A. D. C.), the decision upholding denial of a motion under Rule 34 was based on *Hickman* v. *Taylor*. The court said (p. 812):

> Rule 34 authorizes the District Court to order production of documents, papers, etc., upon motion of a party "*showing* good cause," not upon a mere allegation or recitation that good cause exists. The rule contemplates an exercise of judgment by the court, not a mere automatic granting of a motion.

The court also said (p. 814):

> But it was not the duty of the District Court to search out a "good cause" for the production of the report.

> It was the duty of the appellant explicitly to show in his motion or by a supporting affidavit the need of the report for the purposes of the trial.

The sufficiency of a showing of "good cause" for production of documents is to be judged, at least in part, in the light of the information already supplied or offered in response to the motion to produce. Thus, in *Hickman* v. *Taylor,* this Court, in determining whether the discovery which was there sought went beyond the bounds permitted by the Federal Rules of Civil Procedure, gave considerable weight to the extensive information which had been obtained from the defendant under these rules (329 U. S. 495, at pp. 508–509, 513). Here the United States has already furnished a vast number of documents, the names of all of its prospective witnesses, and the statements made to it by those whom it expected to call as witnesses (*supra,* p. 8); it has offered to furnish all references to documents made in the reports by agents of the Federal Bureau of Investigation and, in addition, verbatim copies of the agents' reports of all interviews, agreeing to submit to the trial judge the documents from which these extracts were made in order that their accuracy might be checked (*supra,* pp. 13, 14). If any defendant required production and discover going beyond this, it would certainly seem that a particularization of his need would be essential to a showing of good cause.

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B. *The production of documents required by the district court's order exceeds the limits of permissible discovery under Rule 34.*—In *Hickman* v. *Taylor*, 329 U. S. 495, 500, this Court held that the "pre-trial deposition-discovery mechanism established by Rules 26 to 37" of the Federal Rules of Civil Procedure does not permit requiring counsel in a case to furnish either written statements which he had obtained from prospective witnesses or his report of statements made to him by prospective witnesses. The Court held (see p. 510) that such material is the work product of a lawyer, which "falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." The Court said (pp. 510–511):

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

The opinion concluded (p. 514):

> When Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were

> thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.

There could hardly be a clearer invasion of that "degree of privacy" which is "outside the arena of discovery" than to require a lawyer to produce his correspondence relating to a case in litigation. Yet in the instant case precisely this demand was made and enforced. The district court's order requires the production of the correspondence relating to the case between the Department of Justice and "private" persons or corporations, in other words, the correspondence of the lawyers for the United States.

The reports made by agents of the Federal Bureau of Investigation are likewise within the scope of what constitutes a lawyer's essential working tools, and thus not within the discovery provisions of the Rules of Civil Procedure. To the extent that the investigating FBI agents are part of the legal staff in the case,[12] the *Hick-*

[12] Agents of the Federal Bureau of Investigation, when engaged in the preparation of litigation, are themselves a part of the legal staff in charge of the case. They are officers of the Department of Justice (5 U. S. C. 299, 300; *Cooper* v. *O'Connor*, 99 F. 2d 135, 139 (C. A. D. C.), certiorari denied, 305 U. S. 643, rehearing denied, 305 U. S. 673, 307 U. S. 651; *Weinberg* v. *United States*, 126 F. 2d 1004, 1008 (C. A. 2)), and may be ordered to perform the duties of any officer of the Department (5 U. S. C. 311), including the conduct of legal proceedings (5 U. S. C. 310).

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man case directly applies. But, in any event, their investigations of possible violations of the antitrust laws are directed and controlled, as to subject matter and scope, by the lawyers on the staff of the Antitrust Division of the Department of Justice,[13] and in this situation, the *Hickman* doctrine governs. In *Alltmont* v. *United States*, 177 F. 2d 971, *supra*, the court considered whether the *Hickman* doctrine applies to statements obtained from prospective witnesses, not by a lawyer himself, but by others acting on his behalf. The court of appeals' ruling has special pertinence here because the question in issue was whether parties who had instituted suit against the United States were entitled to obtain from it, through discovery proceedings, written statements of witnesses taken by agents of the Federal Bureau of Investigation. The court, in holding that such statements are within the rationale of the *Hickman* decision, said (p. 976):

> * * * we can see no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and those obtained by others for the use of the party's trial counsel. In each case the

[13] Until comparatively recently, these lawyers themselves carried on most of the investigative work relating to violation of the antitrust laws. See Annual Report of the Attorney General, 1946, p. 354. Shift of this work to the Federal Bureau of Investigation was a matter of internal departmental administration.

> statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files for his use in representing his client at the trial.
>
> * * * * *
>
> Certainly no valid distinction can be based on the fact that in the one case trial counsel does all the work of preparation for trial, including the interviewing of witnesses, while in the other case he is assisted by others employed by him or by his client. Indeed to make such a distinction would discriminate in favor of the party whose lawyer himself does all the work of preparation for trial and against the one whose counsel delegates part of that task to others.

In the *Hickman* case this Court said (pp. 511–512), that there might be special and unusual circumstances justifying discovery to obtain from the files of a lawyer written statements of prospective witnesses. But the Court said (p. 512) that it doubted that any circumstances would justify requiring production of oral statements made to him, whether or not embodied in memoranda. The present case involves the latter situation insofar as the FBI reports deal with persons interviewed by agents. Each such report sets forth merely the agent's recollection or summary of what the interviewee said; no written statements were obtained (*supra*, p. 8, note 5).

We submit, therefore, that under the *Hickman* case the United States might properly have de-

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clined any disclosure as to the contents of the FBI reports in its possession. Actually, it volunteered to produce all portions of the reports dealing with interviews and all references to documents made in the reports (*supra*, pp. 13–14).[14] The only matters withheld were references to memoranda outlining the scope and nature of the investigation to be made, exploratory references between FBI offices, and certain gratuitous expressions of opinion on the merits of the case made by one agent (*id.*). Plainly these are matters which, if relevant at all to defendants' needs in preparing for trial, are not so vital as "to permit * * * an exception to the policy underlying the privacy of [counsel's] professional activities" (329 U. S. at 513).

II

THE CORRESPONDENCE OF THE DEPARTMENT OF JUSTICE AND REPORTS OF AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION WHICH THE DISTRICT COURT ORDERED PRODUCED WERE PRIVILEGED, AND THUS NOT SUBJECT TO DISCOVERY

Introduction.—Up to this point of the Argument, we have sought to demonstrate that Rule 34 of the Federal Rules of Civil Procedure does not, in the circumstances of this case and quite apart from any question of privilege, justify the issuance of an order to produce the documents in question. But beyond this, Rule 34 of the Fed-

[14] It also offered to submit the reports to the courts for verification of the accuracy of such extractions (*id.*).

eral Rules of Civil Procedure, quoted *supra*, p. 4, authorizes a court to order production of documents and other tangible things "not privileged."[15] The Rule therefore does not reach any matter which is privileged by statute, the Constitution, or the common law. Adoption of Rule 34 did not abridge or limit any privilege against disclosure so given.

Consequently, we must turn to the question of privilege. But at the outset, it is of the utmost importance to note that, despite the separate treatment given Rule 34 and the privilege in this brief, the two are, in the circumstances of this case, closely related. Whether "good cause" for production has been shown, or whether "adequate reasons to justify" "invading the privacy of an attorney's course of preparation" (*Hickman* v. *Taylor*, 329 U. S. 495, 512), have been made to appear, are both issues in the resolution of which a complex of factors must be considered. And, certainly, when, as we shall show, there is, at the minimum, a substantial claim of executive privilege standing in the way of discovery, the burden on the party seeking production of documents is even heavier than it might otherwise be to justify his demand. In other words, the very existence of a substantial question of privilege confirms the conclusion which we have drawn in

[15] Rule 26 (b), to which Rule 34 refers, likewise applies only to matter "not privileged." (See *supra*, p. 4.)

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Point I—that the appellees have not sufficiently justified their demands.[16]

The executive privilege does stand, moreover, as an independent barrier to the production of the documents which the district court ordered. And it is to establish that proposition that the remainder of this brief is devoted.

A. *Revised Statutes, Section 161, and valid regulations thereunder, vest in the Attorney General the power and duty to determine the privileged character of the documents which the district court ordered to be produced.*—The privilege against disclosure which the Attorney General has here asserted has the direct support of statute. Revised Statutes, Section 161, quoted *supra*, pp. 2–3, authorizes the head of each department of the government to prescribe regulations, not inconsistent with law, "for the government of his department" and "the custody, use, and preservation of the records, papers, and property appertaining to it." Pursuant to the authority thus con-

[16] Compare Chief Justice Marshall's views at the trial of Aaron Burr:

"I can readily conceive that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure. *The occasion for demanding it ought, in such a case, to be very strong, and to be fully shewn to the court before its production could be insisted on.* * * * Such a letter, though it be a private one, seems to partake of the character of an official paper, and to be such as ought not on light ground to be forced into public view." [Italics supplied.] 2 Robertson, *Burr's Trials* (1808) pp. 535–536.

ferred, the Attorney General, in 1939, issued an order which designates as "confidential" all official files, documents, and records in the offices of the Department of Justice, including the Federal Bureau of Investigation." The order forbids disclosure of such files, documents, etc., except in the discretion of the Attorney General or a designated official acting for him, and provides that when a subpoena *duces tecum* for the production of any such files, documents, etc., is served on any employee, he shall decline to produce them unless otherwise expressly directed by the Attorney General.

If the Attorney General's order is within the authority granted by Section 161 and if the section, as implemented by this order, is constitutional, the documents which the district court ordered produced were "privileged" and Rule 34 did not permit an order requiring their promotion. We submit that *Boske* v. *Comingore,* 177 U. S. 459, directly establishes both that Section 161 authorizes the Attorney General's order and that this exercise of the authority granted by Congress is constitutional.

In the *Boske* case, the Commonwealth of Kentucky had instituted a proceeding to ascertain the amount and value of whisky in bonded warehouses owned by the defendants but not listed for taxation, and to enforce state and county taxes

[17] The order is quoted in full, *supra*, pp. 3–4.

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on such whisky. The United States Collector of Internal Revenue declined to file with the state court copies of his official records showing the liquor which the defendants had deposited in, and withdrawn from, bonded warehouses. The Collector was thereupon adjudged in contempt and committed to jail until he should comply with the court's demand. A federal district court released him on writ of habeas corpus, and, on appeal from the order of release, this Court held that the Collector had properly refused to produce his records since the regulations of the Treasury Department forbidding their disclosure were binding and valid.

The Treasury regulation, like Order No. 3229 of the Attorney General, recited that disclosure of such records by a Collector is held to be contrary to public policy and not permitted, and that process issued for their production by a state or federal court should be directed to the Secretary for authentication and transmittal of the documents "unless it should be found that circumstances or conditions exist which makes it necessary to decline, in the interest of the public service, to furnish such a copy."

The Court stated that if these regulations were authorized by the statute, and if the statute were constitutional, the state authorities were without jurisdiction to compel the Collector to violate them. The Court pointed out (177 U. S. 467, 468), that the Secretary was authorized by the statute to

make regulations not inconsistent with law, for the custody, use and preservation of such records, and the Court holds the statute, R. S. 161, to be a valid exercise of congressional power under Article I, Section 8.

Turning to the question of whether the regulation was inconsistent with law, within the meaning of the phrase as used in R. S. 161, the Court stated, "There is certainly no statute which expressly or by necessary implication forbade the adoption of such a regulation. This being the case, we do not perceive upon what ground the regulation in question can be regarded as inconsistent with law * * *" (p. 469).

The Court comments that "reasons of public policy may well have suggested the necessity * * * of not allowing access to the records * * * except as might be directed by the Secretary * * *." The interests of taxpayers as well as the functions of the Treasury Department might be affected adversely if disclosure were not so limited. The Court concludes that "At any rate, the Secretary deemed the regulation in question a wise and proper one, and we cannot perceive that his action was beyond the authority conferred upon him by Congress" (p. 470).

Boske v. *Comingore* has been followed by a series of lower court decisions in similar and related situations.[18] This case differs from it

[18] In *Ex Parte Sackett*, 74 F. 2d 922 (C. A. 9) government files in the possession of a subordinate official were

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only in that the Federal Government is here, and was not there, the moving party. But we shall demonstrate that that difference does not work a difference in result. (See *infra*, pp. 57–63.) Before reaching that question, however, it is helpful to consider such historical and developmental factors as will reveal R. S. 161 in proper perspective.

B. R. S. 161 reflects the constitutional independence of the executive.—The history of R. S. 161 makes it clear that it is considerably more than a provision for routine administration by agency heads in handling their internal housekeeping. Rather, it was intended to be a grant of independent authority, in accordance with and as part of the fabric of the constitutional plan of separation of powers. R. S. 161 stems directly from the original organic acts establishing the executive departments (1 Stat. 28, 49, 65, 68, 553). It is thus one of the cornerstones of the executive branch. It embodies a recognition of

held to be immune from subpoena in a private antitrust action, even though the documents sought were copies of records of the defendant which, it was alleged, the defendant had destroyed. See also *United States* ex rel. *Touhey* v. *Ragen and McSwain* (C. A. 7), decided February 24, 1950; *In re Huttman*, 70 Fed. 699 (D. Kans.); *In re Weeks*, 82 Fed. 729 (D. Vt.); *In re Lamberton*, 124 Fed. 446 (W. D. Ark.); *Stegall* v. *Thurman*, 175 Fed. 813 (N. D. Ga.); *Walling* v. *Comet Carriers*, 3 F. R. D. 442 (S. D. N. Y., 1944); *Meyer* v. *Home Insurance Co.* 127 Wis. 293; *Federal Life Ins. Co.* v. *Holod*, 30 F. Supp. 713 (M. D. Pa.); *Brent* v. *Hagner*, Fed. Cas. No. 1839 (C. C. D. C., 1836).

the independence of the executive: Under the Continental Congress, the relationship between legislature and executive had been modeled on the British system. The executive departments were, in effect, answerable to the legislature, and could be called on for an accounting. A resolution of the Continental Congress creating the Department of Foreign Affairs, whose head was appointed by and held office at the pleasure of Congress, provided:

> That the books, records and other papers of the United States, that relate to this department, be committed to his custody, to which, and all other papers of his office, any member of Congress shall have access: provided that no copy shall be taken of matters of a secret nature without the special leave of Congress. [*Journals of the Continental Congress,* Vol. XXII (1782), pp. 87–92.]

The complete change wrought by the Constitution in establishing the three independent branches (The Federalist, Nos. XLVII, XLVIII) was reflected in R. S. 161. See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949), 10 Fed. Bar. Journal 319, 328–330. The privilege which it confers derives from the same constitutional source as, and closely parallels, the executive privilege which has consistently and successfully been asserted in response to Congressional attempts to require production by the

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executive branch, often of the very type of documents involved in this case.[19]

During the administration of President Hayes, for example, the House Judiciary Committee, under the chairmanship of Benjamin F. Butler, pointed out that all resolutions directed to the President relating to the production of records properly would contain the clause "if in his judgment not inconsistent with the public interest." H. Rep. No. 141, 45th Cong., 3d Sess., p. 3. And the committee continued (*id.* at pp. 3 and 4):

> * * * whenever the President has returned (as sometimes he has) that, in his judgment, it was not consistent with the public interest to give the House such information, no further proceedings have ever been taken to compel the production of such information Indeed, upon principle, it would seem that this must be so. The Executive is as independent of either house of Congress as either house of Congress is independent of him, and they cannot call for the records of his action or the action of his officers against his consent, any more than he can call for any of the journals and records of the House or Senate.[20]

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[19] See Wolkinson, *Demands of Congressional Committees for Executive Papers* (1949) 10 Fed. Bar J. 103–150, 223–259, 319–350.

[20] For a recent instance of Congressional assertion of independence as against the judiciary, see 96 Cong. Rec. (daily ed.) 589–590 (January 18, 1950): H. Res. 427, 81st Cong., 2d

The decision as to whether there should be compliance with a particular request was the executive's, the committee stated:

> Somebody must judge upon this point. It clearly cannot be the House or its committee, because they cannot know the importance of having the doings of the executive department kept secret. The head of the executive department, therefore, must be the judge in such case and decide it upon his own responsibility to the people, and to the House, upon a case of impeachment brought against him for so doing, if his acts are causeless, malicious, willfully wrong, or to the detriment of the public interests.

There are many other instances of successful assertion of the executive privilege, *vis à vis* Congress, including one which gave rise to a great Congressional debate, occupying the Senate for almost two weeks, during President Cleveland's first administration. 17 Cong. Rec. 2211–2814. See Sen. Misc. Doc., Vol. 7, 52d Cong., 2d Sess., pp. 235–243; 8 Richardson, *Messages and Papers of the Presidents,* pp. 375–383; 17 Cong. Rec.

Sess.: "* * * *Resolved*, That by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control or possession but by its permission * * *." 96 Cong. Rec. (daily ed.) 1428, 1429 (Feb. 2, 1950); see on subsequent subpoena, H. Res. 465, 96 Cong. Rec. (daily ed.) 1727 (Feb. 8, 1950); H. Res. 469, 96 Cong. Rec. (daily ed.) 1803, 1804 (Feb. 13, 1950).

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4095. And while there may very well be differences in the force of the privilege when it touches on the interest of parties to a judicial proceeding,[21] the executive's relations with Congress, if not controlling, are certainly relevant. For before a balance can be struck between claimed individual rights and an executive privilege, the weight to be given the privilege must be ascertained by reference to the history of its assertions and the reaction to those assertions.

Extended reference has already been made to this Court's decision in *Boske* v. *Comingore,* 177 U. S. 459, and the cases in which it has been followed. But, even before that decision, in *Marbury* v. *Madison,* 1 Cranch 137, Attorney General Lin-

[21] But see the views of Senator Jackson, later to become an associate justice of this Court (17 Cong. Rec. 2623):

"Sir, has this body, has the Congress of the United States any more authority over papers in the Executive Departments of this Government than the co-ordinate independent branch of the Government—the judiciary? The judicial department of this Government has as much power and authority over all papers in the hands of the Executive or in any Department as the entire Congress has. When the rights of individuals, affecting their life, liberty, or property, are pending before the courts, the judicial department has as much power over papers as the Senate or the whole Congress; and yet it has been universally recognized from the very foundation of this Government that the judicial department of the Government can not call for papers and procure them either from the President or the head of an Executive Department at its own will, but that the discretion rests with the Executive and with the Departments how far and to what extent they will produce those papers."

coln, appearing as a witness, objected to answering certain questions concerning the disposition of Marbury's commission while he was Secretary of State. "On the one hand, he respected the jurisdiction of this court, and on the other, he felt himself bound to maintain the rights of the executive" (1 Cranch 143). The Court said, "they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it; and if he thought that anything was communicated to him in confidence, he was not bound to disclose it * * *" (1 Cranch 144). Lincoln subsequently answered substantially all of the questions (1 Cranch 145). When sitting on Burr's trial, Chief Justice Marshall issued a subpoena to President Jefferson for the production of a letter sent by General Wilkinson to the President, which Burr affirmed contained information vital to his defense. Jefferson ignored the subpoena and directed the United States Attorney to produce only such portions of the letter as he deemed not to be confidential (1 Robertson, *Burr's Trials* (1808) pp. 177, 180, 186–188; 1 Dillon, *Marshall: Life, Character, Judicial Services* (1903) pp. XLVI–XLIX; 9 Ford, *Writings of Thomas Jefferson* (1898) pp. 55–57 (62)). In both cases, the Court avoided treating the issue as a test of power with the executive.[22]

[22] "In no case of this kind would a court be required to proceed against the president, as against an ordinary individ-

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Every Attorney General considering the problem has been of the opinion that information disclosure of which would be detrimental to the public interest is privileged, and that the determination of the executive is conclusive. 11 Ops. A. G. 137, 142–143; 15 Ops. A. G. 378; 16 Ops. A. G. 24; 25 Ops. A. G. 326. Attorney General Jackson has said (40 Ops. A. G. 45, 49):

> This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interests. The courts have also held that the question whether the production of the papers would be against the public interest is one for the executive and not for the courts to determine. *Marbury* v. *Madison,* 1 Cranch 137, 169; *Totten* v. *United States,* 92 U. S. 105; *Kilbourn* v. *Thompson,* 103 U. S. 168, 190; *Vogel* v. *Gruaz,* 110 U. S. 311; *In re Quarles and Butler,* 158 U. S. 532; *Boske* v. *Comingore,* 177 U. S. 459; *In re Huttman,* 70 Fed. 699; *In re Lamberton,* 124 Fed. 446; *In re Valecia Condensed Milk Co.,* 240 Fed. 310; *Elrod* v. *Moss,* 278 Fed. 123; *Arnstein* v. *United States,* 296 Fed. 946; *Gray* v. *Pentland,* 2 Sergeant & Rawle's (Pa.) 23, 28; *Thompson* v. *German Valley R. Co.,* 22

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ual. The objections to such a course are so strong and so obvious, that all must acknowledge them." Chief Justice Marshall in 2 Robertson, *op. cit. supra,* p. 536.

N. J. Equity 111; *Worthington* v. *Scribner*, 109 Mass. 487; *Appeal of Hartranft*, 85 Pa. 433, 445; 2 *Burr Trials*, 533–536; see also 25 Op. A. G. 326).[23]

The privileged nature of information acquired by public officials has been recognized by the states in a variety of statutes protecting the confidence of communications or government documents.[24] Some fourteen states have enacted statutes providing in general terms that a public officer cannot be examined as to communications made to him in official confidence, when the public interest will suffer by disclosure.[25] In addition, many

[23] Accord: American Law Institute, *Model Code of Evidence* (1942), Rule 228; 1 Greenleaf, *Evidence* (1899 Ed.), Sec. 251; 3 Jones, *Evidence* (4th Ed., 1938), Sec. 762. Wigmore has been of the contrary view (Wigmore on *Evidence* (1940), Sec. 2378a) since 1905 (1905 Ed., Sec. 2375), although he recognizes a privilege for communications by informer and a limited class of state secrets, not clearly defined.

[24] Aside from statutes, the courts of the several states have long recognized the privileged nature of such data. Early cases give effect to the privilege of communications from informants, and to other limitations upon the attempt to obtain evidence from state officials by court process. See notes 34 and 38, *infra*, pp. 50 and 54.

[25] Calif. Code Civ. Prod. Ann. § 1881 (5) (1941); Idaho Code Ann. § 9–203 (1948); Code of Iowa § 622.11 (1946); Minn. Stat. Ann. § 595.02 (5) (West 1947); Mont. Rev. Code Ann. § 10536 (5) (1935); Neb. Rev. Stat. § 25–1208 (1948); Nev. Comp. Laws Ann. § 8975 (1929); N. D. Rev. Code § 31–0106 (1943); Ore. Comp. Laws Ann. § 3–104 (5) (1940); S. D. Code § 36.0101 (5) (1939); Utah Code § 104–49–3 (1943); Wash. Rev. Stat. Ann. § 1214 (5) (1932); and see Colo. Stat. Ann. Ch. 177 § 9 (1949); Ga. Code Ann. § 38–1102 (1937).

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statutes dealing with narrower classifications of official information have been enacted; among these are statutes relating to police reports of highway accidents, tax returns, reports submitted in compliance with banking laws, health reports, and many others.[26] The validity of such legislation forbidding disclosure of information by public officials has been upheld by the state courts.[27] The variance in wording and coverage of particular statutes prevents any generalization as to the scope and effect of such legislation. It may be said, however, that the widespread pattern of legislation imposing restrictions upon free disclosure of this type of information indicates an

[26] For a general survey and discussion of state legislation, see Sanford, *Evidentiary Privileges against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 82 (1949); Note, 165 A. L. R. 1302.

[27] *Appl. of Manufacturers Trust Co.*, 269 App. Div. 108, 53 N. Y. S. 2d 923 (1945); *Oklahoma Tax. Comm.* v. *Clendinning*, 193 Okla. 271, 143 P. 2d 143 (1943); *Hickok* v. *Margolis*, 221 Minn. 480, 22 N. W. 2d 850 (1946); *Fleming* v. *Superior Court*, 196 Cal. 344, 238 Pac. 88 (1925); *Thaden* v. *Bagan*, 139 Minn. 46, 155 N. W. 864 (1917); *Peden* v. *Peden's Adm'r*, 121 Va. 147, 92 S. E. 984 (1917); *In re Herrnstein*, 20 Ohio Ops. 405, 6 Ohio Supp. 260 (1941); *Maryland Casualty Co.* v. *Clintwood Bank*, 155 Va. 181, 154 S. E. 492 (1930); *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 83 P. 2d 305 (1938); *Leave* v. *Boston El. Ry. Co.*, 306 Mass. 391, 28 N. E. 2d 483 (1940); *Dwelly* v. *McReynolds*, 6 Cal. 2d 128, 56 P. 2d 1232 (1936); *Simonsen* v. *Barth*, 64 Mont. 95, 208 P. 938 (1922). Contra: *In re French*, 315 Mo. 75, 285 S. W. 513 (1926).

accepted public policy and a recognition of the principles of the earlier court decisions and of the constitutional mandate that the executive be independent.

Nor can one ignore British judgments in the field of executive privilege. For while their constitutional system differs from our tripartite organization, they too have, as much as do we, the conflict between the demands of litigants and the necessities of executive privacy. There is available to us a most authoritative recent decision in which the problem has been thoroughly canvassed—the decision of the House of Lords in *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624.[28] The action arose out of the sinking of the submarine Thetis, and was brought by representatives of deceased seamen against the builders. Discovery was sought of the plans, contracts for construction, and other documents. The First Lord of the Admiralty filed an affidavit, claiming privilege from disclosure on the ground that it would be injurious to the public interest. As the Lord Chancellor put it:

[28] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords" (58 Law Quarterly Rev. 436). The decision also disapproves *Robinson* v. *State of South Australia* (1931) A. C. 704).

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> My Lords, the question to be determined in this appeal is as to the circumstances in which it may be validly claimed on behalf of the Crown that documents, the production of which is demanded by regular process in a civil action, should not be produced on the ground that it would be contrary to the public interest to produce them, and as to the proper procedure to be followed if this claim is to be made good. This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be prejudiced. The question may arise, as in the present instance, in an action between private parties, but it may also arise in a case where the Crown itself, or the Crown's representative, is a party to the suit and declines to produce a document or objects to the production of a document by the other side.

After reviewing precedents and pointing out that the rule in criminal cases might be different, the opinion states:

> * * * The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires

> that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

The Lord Chancellor then considers the manner in which the privilege should be raised and, a key issue in the case, whether the determination of privilege is to be made by the executive or by the court:

> Two further matters remain to be considered. First, what is the proper form in which objection should be taken that the production of a document would be contrary to the public interest? And secondly, when this objection is taken in proper form, should it be treated by the court as conclusive, or are there circumstances in which the judge should himself look at the documents before ruling as to their production?

He concludes that the privilege should be claimed by the head of the executive department:

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their

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> actual contents or because of the class of documents, e. g., departmental minutes, to which they belong.

And, on the second question, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.* (1909) Sess. Cas. 335—"A department of Government, to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *", the Lord Chancellor states that the executive determination of privilege is conclusive on the court, pointing out, also

> In many cases there is a further reason why the court should not ask to see the documents, for where the Crown is a party to the litigation, this would amount to communicating with one party to the exclusion of the other, and it is a first principle of justice that the judge should have no dealings on the matter in hand with one litigant save in the presence of and to the equal knowledge of the other.[29]

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[29] "Nor can courts sit *in camera* in order to be taken into executive confidences" (*Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111). Compare *Rex* v. *Davies* (1945) 1 K. B. 435, 442 (Humphreys, J.) "* * * I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and * * * it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it

The opinion discusses the basis on which the executive determination should be made.[30] It then outlines the consequences of the executive decision, made after due consideration:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the

much more difficult for him to do his duty * * *" (Oliver, J.). "* * * the judge who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider. * * *"

[30] "In this connection, I do not think it is out of place to indicate the sort of grounds which would not afford to the minister adequate justification for objecting to production. It is not a sufficient ground that the documents are 'State documents' or 'official' or are marked 'confidential.' It would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister of the department does not want to have the documents produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified; for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service" (1942 A. C. at 642).

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> public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

This decision occasioned considerable comment, both pro[31] and con,[32] but when the Crown Proceedings Act, 1947, 10 and 11 Geo. 6, C. 44, s28, authorized discovery against the Crown for the first time, it exempted any document which would, in the opinion of a Minister, be injurious to the public interest to disclose, and specifically provided for the right of the Minister to deny the very existence of such a document.

The indications from this Court's opinion in *Boske* v. *Comingore,* 177 U. S. 459, seem to be that R. S. 161 reflects the executive's constitutional independence of the judiciary as much as do these provisions of the Crown Proceedings Act.[33]

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[31] *Production of Documents: The State and the Individual* (1942) 193 L. T. 224; 21 Can. Bar. Rev. 51: 58 L. Q. R. 31.

[32] 58 L. Q. R. 436; 59 L. Q. R. 102; 20 Can. Bar. Rev. 805.

[33] "* * * Such order ought not to be made against the Executive of the state, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official

C. *The right to keep confidential documents of the kind here involved gives effect to sound considerations of public policy.*—The privilege granted to the executive by R. S. 161 reflects an established public policy composed of a complex of elements. Among these is the interest in efficient administration of the government free from interference;[34] secrecy of matters of foreign policy, security, and national defense;[35] protection

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duty, in protecting the right and dignity of his office, he will not comply even if directed by an order * * *" (*Thompson* v. *German Valley Railroad Co.*, 22 N. J. Eq. 111, 114 (1871).

[34] In libel actions based on communications to government officials relating to the business of their office, the documents "are privileged from disclosure, on the ground of public policy, and the production will not be compelled by courts of law or equity" (*Gardner* v. *Anderson*, Fed. Cas. No. 5220 (C. C. D. Md., 1876); *Gray* v. *Pentland*, 2 Serg. & Rawles 23 (Pa., 1815); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W. D. Ky.) and cf. note 18, *supra*, p. 34).

[35] Cf. President Truman's directive of March 13, 1948, 13 F. R. 1359. In *Totten* v. *United States*, 92 U. S. 105, a contract for espionage made with President Lincoln was held to be of its nature so confidential in the public interest that suit would not lie on it. Similarly, in a contract action between private parties, military secrets are privileged in the public interest, even if privilege is not claimed by a party (*Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 (E. D. Pa.); *In re Grove*, 180 Fed. 62 (C. A. 3); *Pollen* v. *Ford Instrument Co.*, 26 F. Supp. 583 (E. D. N. Y.)).

The Attorney General's claim of privilege for the F. B. I. reports in the public interest is at least in part based on the needs of national security. Under the Attorney General, the F. B. I. is the branch of the Government primarily responsible for the internal security of the nation. Complete

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of communications by informants to officials; shielding of prospective witnesses from undue pretrial influences, particularly in criminal cases;

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confidence of informants that they will be protected is of the highest importance to effective operation in this field. Secrecy of methods, personnel, sources and techniques is necessarily closely guarded. Thus *Duncan* v. *Cammell, Laird & Co.* (1942) A. C. 624, 635, particularly recognizes that "the public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than on the contents of the particular document itself." In *United States* v. *Haugen*, 58 F. Supp. 436 (E. D. Wash.) affirmed on other grounds 153 F. 2d 850 (C. A. 9), the defendant was charged with counterfeiting obligations of the United States, consisting of meal tickets for the Commissary of the Hanford Engineering Works. At that time, the nature of the business of the Hanford Engineering Works was the nation's most closely guarded secret. In order to convict the accused, it was necessary to prove that the Commissary was an agency of the United States. The Government claimed that the contract between the United States and DuPont, for operation of the plant, was privileged, but offered to introduce secondary evidence of those portions of the contract establishing the status of the Commissary. The district court permitted secondary evidence to be introduced on this point, by the testimony of a lawyer who had read the original contract (see 153 F. 2d 852), and Haugen was convicted. There can be little question who was better qualified to determine whether, in 1944, a contract for the production of fissionable material was privileged—the district judge or the physicists and informed military men in charge of the project. And, even if the judge possessed adequate technical background to appreciate the enormity of the secret, had the court passed on the document it would, at the least, have added the judge, if not the clerk, to the select list of those having knowledge of a national secret.

as well as the constitutional doctrine of the independent functions of executive and judiciary with which the preceding subsection of this brief was concerned.[36]

Communications may take the form of letters by informants to the law enforcement agency or oral statements recorded in the reports of investigatory agents. But, in whatever form, free communication with private citizens is vital to the enforcement of the antitrust laws. Without the cooperation of the public, many violations would not come to the attention of the Department of Justice, or could not be reached for lack of proof. The confidence of such informants in the law-enforcement arm of the government is based in large part on the knowledge that their identity and information will be kept confidential and not made accessible to those who might wish to retaliate against the informer. Were it to become general practice, at the outset of an antitrust suit, to disclose all such informants, many small businessmen, employees or acquaintances

[36] Constitutional doctrines derive in part, of course, from considerations of public policy. And so, in a sense, this subsection of the Argument is merely an expansion of that immediately preceding. The division between the two is justified only by the fact that the preceding subsection dealt largely with what may be called institutional reasons for the executive privilege; i. e., the necessary independence of the legislative, judicial and executive branches one from the other as part of a tripartite system of checks and balances—while this subsection deals with *other* policy considerations.

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would hesitate to risk the financial or social vengeance of those complained against.

But the interest of the government is much broader than the problem of antitrust violations alone. The Attorney General, through the Department of Justice with its investigative arm, has responsibility for all federal law enforcement, involving crimes and civil infractions of the widest scope and variety. The credit of the Department of Justice and the F. B. I. would be damaged seriously if discovery of informants' identity and the information supplied were generally permitted, with grievous consequences going far beyond the confines of this case. In some circles, (e. g., petty thieves, racketeers, tax evaders, as well as espionage agents and other more notorious law violators) the fate of known informants is swifter and more obvious than of those who merely criticize the business practices of an established corporation. When it is known that conversations with the F. B. I. are quite likely to become matters of court record and subsequent publication, those conversations will be less frequent. Such news travels fast among those whose security and peace of mind depend upon maintenance of their anonymity.

The importance of protecting the anonymity of informants is thus so great that it has been given recognition, not only as one of the reasons supporting the privilege of the executive not to

make public its files,[37] but also, separately, as an independent ground for exclusion. Thus, this Court has held that the identity of the informant and the nature of the information furnished "cannot be compelled without the assent of the government," *In re Quarles and Butler,* 158 U. S. 532, 536, unless it is essential to the defense. *Scher* v. *United States,* 305 U. S. 251, 254.[38]

Distinct from the protection of informants but related to the problem of keeping open the chan-

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[37] In *Vogel* v. *Gruaz*, 110 U. S. 311, 316, this Court said: "* * * it is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws; and * * * a court of justice will not compel or allow such information to be disclosed, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government, the evidence being excluded not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications."

[38] Washington, Cir. J., in *United States* v. *Moses,* Fed. Cas. No. 15825 (C. C. E. D. Pa., 1827), "such a disclosure can be of no importance to the defence in this case, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes which they know to have been committed." Accord: *Elrod* v. *Moss*, 278 Fed. 123 (C. A. 4); *Arnstein* v. *United States*, 296 Fed. 946 (C. A. D. C.), certiorari denied, 264 U. S. 595; *Segurola* v. *United States*, 16 F. 2d 563 (C. A. 1), affirmed, 275 U. S. 106; *United States* v. *Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *Worthington* v. *Scribner*, 109 Mass. 487; *People* v. *Laird*, 102 Mich. 135, 60 N. W. 457; *State* v. *Soper*, 16 Me. 293; *Maine* v. *Fortin*, 106 Me. 382, 76 A. 896.

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nels of communication with the government, is the protection of the innocent from the publication of information in the hands of the government which may be entirely false or which, being fragmentary, may produce a distorted picture. The danger arises because in many investigations, in the first instance, information of any type is sought—hearsay and gossip, the true and the false, the remote and the contingent. Out of such undigested "raw material," the investigator and lawyer seek to discover the truth and to assemble evidence acceptable by legal standards. The government cannot afford to refuse the trivial and the malicious, for sometimes these lead to the important fact. Yet, by accepting them as a necessary part of an investigation, by no stretch of the imagination is credence given to them. Exposure of such trivia and falsehoods by the district court may work the gravest injury and injustice to those named. The Attorney General has consistently recognized his obligation to protect against publication of unverified accusations. It is all too apparent that later attempted exoneration seldom washes out the taint of the original unfounded accusation.

The determination of what documents should not be disclosed in the public interest is a determination necessarily within the discretion and distinctive knowledge of the executive branch. It is the executive who day in and day out is responsible for the administration of the laws and

for the national security, and who is able to evaluate the importance of the particular piece of information sought in relation to an entire course of government policy or action. To the extent that the public interest is at stake in these circumstances, the public interest necessarily requires that the determination of what is privileged be made by the agency responsible for the national program for the protection of which the privilege is asserted. To divorce discretion from responsibility is in itself a denial of the public interest.

The balance of conflicting public interests involves a question "of high constitutional importance," *Duncan* v. *Cammell, Laird* (*supra*, p. 629), reflecting the relationship of the executive and the judiciary; it is peculiarly a problem which "should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."[39] It is the executive who is charged with the continuing administration of the laws and the maintenance of national security, and has the background information and technical knowledge necessary to evaluate what must not be disclosed in the public interest. In a government of separate powers, weight must be accorded to the judgment of the executive in a

[39] Washington's Farewell Address, Richardson, *Messages and Papers of the Presidents*, Vol I, p. 219.

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function primarily within his discretion, else his function is undermined.[40]

D. *The executive privilege is not abandoned when the Government brings suit.*—When the Federal Government is the moving party to an action, the executive privilege is no different, by

[40] "In other words if, from such analogy, we once begin to shift the supreme executive power, from him upon whom the constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognise the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts.

* * * * *

* * * the President of the United States, the governors of the several states and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenf. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession * * * as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent" * * * (*Appeal of Hartranft* (1877) 85 Pa. 433, 445, 447).

virtue of that fact, than when, as in *Boske* v. *Comingore,* 177 U. S. 459, the action involved is between a state and a private individual and the state is seeking disclosure. The public interest in nondisclosure is no less in such instances, and individual justice is no more at stake than in actions brought by a state, or between private parties. Only a superficial analysis of the underlying problem could lead to the assertion that when the government submits to court process it must withhold nothing. Such a rule-of-thumb would have the consequence of forcing the executive to choose between faithfully executing the laws and jeopardizing the national interest in matters deemed confidential, a choice that would necessarily result in a complete absence of law enforcement and abandonment of the Government's legal rights in some areas and some circumstances, or, at the least, in the dismissal of indictments voted by the grand jury and of civil suits in progress.[41] The inaptness of the fiction

[41] When the United States is defendant, the requirement that it disclose information upon generalized motions for discovery upon penalty of default judgment would force it to choose between the national interest protected and the payment of government funds to plaintiffs able to set forth a prima facie cause of action, who may well not be entitled thereto. It would be a strange result if the Federal Rules authorized greater rights before trial than were granted on the merits (Cf. *Totten* v. *United States,* 92 U. S. 105; *Bank Line* v. *United States,* 68 F. Supp. 587, prohibition denied, 163 F. 2d 133, rehearing, 76 F. Supp. 801. The dilemma would become even more pointed in a mandamus action.

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of waiver is particularly apparent when, as here, the Attorney General, appearing for the United States, has affirmatively claimed privilege.[42]

In a series of admiralty actions against, or brought by, the United States in which discovery was sought of the record of a Naval Board of Inquiry, the privilege, based on the need of free and open discussion within the service, was upheld (*Pacific-Atlantic S. S. Co.* v. *United States*, 175 F. 2d 632 (C. A. 4, certiorari denied, 338 U. S. 868); *Anglo-Saxon Petroleum Co.* v. *United States*, 78 F. Supp. 62 (D. Mass.); *The Wright-Papoose*, 2 F. Supp. 43 (E. D. N. Y.); *State of Maryland to use of Daisy Kent* v. *United States*, 1947 A. M. C. 1336 (D. Md., 1947); compare *Alltmont* v. *United States*, 177 F. 2d 971 (C. A. 3)). In *Bank Line Limited* v. *United States*, 68 F. Supp. 587 (S. D. N. Y.), the district court granted discovery. The Government filed a petition for a writ of prohibition, which the court of appeals ruled to be inappropriate, but the majority opinion recommended that the district court consider *Duncan* v. *Cammell Laird & Co.* (1942) A. C. 624 and *Boske* v. *Comingore* in reaching its decision. 163 F. 2d 133. The district court did so but again granted discovery (76 F. Supp. 801). The case was subsequently settled without disclosure by the government. As to civil suits in which the government was plaintiff, discovery before trial against the United States was denied in the following antitrust actions: *United States* v. *Deere and Co.* (D. Minn., 1949) C. C. H. Trade Reg. Reporter, Par. 62, 572; *United States* v. *The Lorain Journal Co., et al.* (N. D. Ohio, E. D.) decided Feb. 15, 1950; see *United States* v. *Kohler Co.*, 13 Fed. Rules Serv. 33.333 (E. D. Pa.); *United States* v. *Schine Chain Theatres, Inc.*, 4 F. R. D. 108 (W. D. N. Y.). The following cases involving enforcement of the Fair Labor Standards Act also bear on the present problem: *Walling* v. *Comet Carriers*, 3 F. R. D. 442 (S. D. N. Y.); but cf. *Walling* v. *Richmond Screw Anchor Co.*, 4 F. R. D. 265 (E. D. N. Y.).

[42] The particular subordinate official who appears in court is not personally responsible for the government's refusal to disclose information. It is not his to disclose. Only the head of the department may direct disclosure,

When, as in this case, the Government has brought an action to enforce a regulatory and criminal statute there is even less reason for the application of a doctrine of waiver or abandonment of its privilege. Whatever may be said for requiring the Government to abide by the same procedural standards as private parties when the Government's interest is similar to that of a private litigant, there is an additional public interest involved when it seeks to prevent violation of a criminal statute by injunctive process. In such a case, the Government is no mere supplicant. It is the duty of Government to enforce the laws and it would be a curious and dangerous consequence if that duty could be exercised only at the price of abandonment of the public interest in non-disclosure of confidential information.

It does not follow that the executive privilege is unqualified or unlimited. But whatever limitations or qualifications there may be cannot sensi-

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R. S. 161; *Duncan* v. *Cammell Laird & Co.*, *supra;* and when a subordinate seeks to dispose of government documents contrary to instructions of his superior, he has ceased to have any legal authority to do so. "The documents, although physically in the possession of the witness, are in law in the custody of the Attorney General * * *." *Ex parte Sackett*, 74 F. 2d 922, 924 (C. A. 9).

It is likewise irrelevant that the information sought is in the possession of the particular Government agency responsible for the "administration of those laws for whose violation the accused has been indicted." But cf. *United States* v. *Grayson*, 166 F. 2d 863, 870 (C. A. 2). When the United States is the privileged party to the action, its several agents have no independent status.

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bly be derived from a mechanical doctrine of waiver. It may be that if the Government, in a criminal case, possesses information which is so vital to the defense that its production might exculpate the defendant, due process would require that that information be divulged at trial if the prosecution is to be pressed[43] (Cf. *Mooney* v. *Holohan*, 294 U. S. 103). As Lord Chief Justice Eyre stated in the *Trial of Thomas Hardy*, 24 State Trials (1794), 199, 808: "if it can be made appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed,

[43] There is no necessity for anticipating the problems that might arise in this connection. It is sufficient here to point to various rulings in this field without discussing the correctness of the ruling in any partcular case. *United States* v. *Andolschek*, 142 F. 2d 503 (C. A. 2) (the Treasury Department was required to produce reports prepared by the accused themselves, relating to their dealings with persons from whom they were charged with taking bribes); *United States* v. *Krulewitch*, 145 F. 2d 76 (C. A. 2); appealed following retrial, 167 F. 2d 943, and reversed on other grounds, 336 U. S. 440 (signed statement directly impeaching government witness); *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2) (OPA records disclosing previous disciplining of government witnesses); *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2).

The decision is often a difficult one: "The most that could be said of their harmful effect, if any, if they be exposed, is that they would produce irritations and perhaps render nugatory efforts of our Intelligence Service on particular inquiries and maybe endanger individual lives." Interlocutory opinion of the court in *United States* v. *Coplon* (1949), Criminal No. 381–49, District Court of the United States for the District of Columbia.

I should be very unwilling to stop it * * *." But, in such a case, the reason for compelling disclosure would be that, in the scales of justice, the defendant's need outweighs the public interest in maintaining the confidential nature of governmental papers. Disclosure would be directed, not because the Government had waived its privilege against production, but because due process requires a tempering of the absolutism of the privilege.

But even such a limitation on the executive privilege would not be likely to be applicable to discovery procedure; it could be invoked only at trial when the issues were firmly drawn and witnesses had testified, and upon a convincing showing of the urgent necessity to the defense of particularly identified evidence. There is a wide gulf between subpoenaing evidence that will contradict in specific particulars the case that has been put in by the prosecution, and an indiscriminate attempt to strip the Government's files before trial. Indeed, the Rules of Criminal Procedure are careful to guard against this type of raid. Rule 16 limits pre-trial discovery to mate-

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"The interest of the state in criminal prosecutions "is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it" (Cooley, C. J. in *People* v. *Davis*, 52 Mich. 569, 573–574, 18 N. W. 362 (1884)).

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rials obtained from the defendant or obtained from others by seizure or by process. And even at trial, production will be required only where the defendant can demonstrate the vital relevance of specifically identified documents.[45]

E. *The district court improperly refused to honor the executive privilege under the circumstances of this case.*—We may concede, *arguendo* then, that in some limited circumstances which we are not here called upon to delineate, the executive privilege must be accommodated to countervailing claims demanding consideration. But there is nothing in the circumstances of this case which justifies the application of anything but an absolute privilege of refusal to disclose Government papers. The defendants in a civil antitrust suit should not be armed at the outset with the Government's files but should, at the least, be required to await trial and demonstrate the need for such information in the light of a concretely developed factual presentation. Appellees here

[45] *United States* v. *Cohen*, 145 F. 2d 82 (C. A. 2), certiorari denied, 323 U. S. 799 (statements to F. B. I. not required to be produced when they had no impeaching value); *United States* v. *Ebeling*, 146 F. 2d 254 (C. A. 2) (would not tend to exculpate the defendant); *United States* v. *De Normand*, 149 F. 2d 622 (C. A. 2), certiorari denied, 326 U. S. 756, rehearing denied, 326 U. S. 808, 811, 327 U. S. 816 (minor contradictions of unimportant testimony); *United States* v. *Simonds*, 148 F. 2d 177 (C. A. 2); *United States* v. *M. Kraus & Bros.*, 149 F. 2d 773 (C. A. 2) reversed on other grounds, 327 U. S. 614; *Boehm* v. *United States*, 123 F. 2d 791 (C. A. 8), certiorari denied, 315 U. S. 800, rehearing denied, 315 U. S. 828.

have neither specified particular documents nor shown a genuine need for the class of documents sought. They have, in essence, shown nothing other than that they are defending a lawsuit. The Government has gone far toward making available everything of conceivable relevance or use to appellees. The demand for more is supported only by the fond hope that a more concrete reason for disclosure may develop after appellees have examined the documents. Such a hope cannot give rise to the necessity for deciding the inevitably delicate question of when, if ever, the judiciary can review the judgment of executive officers, who have also taken oaths to support the Constitution, that the public interest precludes disclosure.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing the complaint should be reversed.

Respectfully submitted.

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